Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act	)	CC Docket No. 96-98
of 1996	)	

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

AT&T's reply responds to the comments of other parties on issues relating to dialing parity, number administration, access to rights-of-way, and notice of technical changes.

There is broad agreement on most of the critical issues relating to implementation of the 1996 Act's dialing parity and number administration provisions. Most fundamentally, there is broad support for the adoption of a uniform nationwide plan to implement toll dialing parity through the "Full 2-PIC" presubscription method. Moreover, none of the comments suggests any legitimate reason to delay implementation of dialing parity beyond January 1, 1997, except as expressly provided under Section 271(e)(2)(B) of the Act, as proposed in AT&T's Comments.

Further, the proposal by Ameritech and Bell Atlantic to recover implementation costs exclusively from their competitors underscores the need for explicit national rules governing the implementation of dialing parity. Nothing could be more contrary to the purposes of the Act, and harmful to competition, than allowing ILECs to charge a fee to new entrants for the "privilege" of competing with them. Because the introduction of competition through dialing parity and other measures benefits all customers, including those remaining with incumbents, it is appropriate to require all carriers to contribute toward cost recovery. Accordingly, as proposed by AT&T and others, the Commission should adopt rules ensuring that implementation costs are recovered in a competitively neutral manner through imposition of an Equal Access Recovery Charge based on minutes of use.

The comments concerning Section 251(b)(3)'s related requirement that LECs provide "nondiscriminatory access to operator services, directory assistance and directory

listings" likewise confirm the need for the Commission to make clear that "nondiscriminatory access" means access equal to that which the LEC provides itself. Any other construction of the statute would defeat its central purpose of ensuring that access to these services or functions is not a factor in the customer's choice of carriers. The Commission should also reject the efforts of a number of ILECs to convert the additional obligation under Section 251(b) to provide nondiscriminatory access into a limitation on their obligations under Section 251(c) to provide access to operator systems, and to make their operator services available for resale at wholesale rates. These explicit requirements of Section 251(c) are in no way diluted by the language of Section 251(b).

Similarly, the comments of those entities that own or control the pathways necessary to reach telecommunications customers underscore the need for explicit national rules implementing their duty to provide access to rights-of-way and other pathways. In particular, the Commission should reject the attempts of some incumbent LECs and other utilities to eviscerate the Act's requirements by severely limiting their obligations to provide truly "nondiscriminatory" access.

For example, a few incumbent LECs claim that they may deny access to their pathways on the grounds of "insufficient capacity." This claim ignores that the Act explicitly limits the ability to invoke purported capacity constraints to utilities that provide electric service. The claims of these and other incumbents based on their alleged existing practices of reserving capacity to cover forecasted demand for periods up to five years are simply irrelevant. The statute precludes any access denial for reasons of insufficient capacity, whether current capacity is actually being used or merely being held in reserve. In all events,

if LECs are capable of expanding capacity for their own use, they are equally capable of expanding capacity to accommodate the statutory rights granted to their competitors.

Incumbent LECs and other utilities also vastly overstate the extent to which their obligation to provide access may be limited by the property rights of third parties. In the case of public property, Section 253(c) of the Act expressly requires local governments to manage their rights-of-way in a manner that is "competitively neutral and nondiscriminatory." An objection by a municipality that permits access to an incumbent while denying it to an entrant would violate this statutory command. With respect to private easements, there is no reason to expect serious opposition from the property owner if the purpose of expansion is to accommodate the utility's obligation to provide access to its pathways. The Commission should make clear that in any such case, the utility is obligated to make available any spare capacity in its existing conduit to accommodate requests of other carriers.

The constitutional challenges raised by incumbent LECs and other utilities to their duty to provide access to their pathways are irrelevant, wrong, or both. Most fundamentally, Section 224(f)(1) unambiguously states that utilities "shall" provide access to any telecommunications carrier, and the Commission is not free to "interpret" the Act to make voluntary what Congress has made mandatory. In all events, even if the duty to provide access could be construed as a "taking," that would not mean that Section 224 is unconstitutional. The Constitution prohibits only those takings that are uncompensated, and the 1996 Act permits utilities to be compensated for any access they provide.

Finally, a broad array of commenters supports the Commission's proposed rules requiring notice of technical changes. The objections by incumbent LECs to these rules are

predictable and insubstantial. Contrary to their claims, the notice requirement of Section 251(c)(5) applies not merely to information that is relevant to the LEC's network "at the interconnect point," but to any information that affects an interconnector's performance or ability to provide services using the ILECs' networks or facilities, whether or not relevant to the interconnect point. The incumbents' objections to the Commission's proposal to apply its Computer III rules governing the timing of disclosure are equally meritless. Because the Computer III timetable has been workable and is familiar to the industry, there is no reason not to apply it here. The one exception is that ILECs should be required to provide notice of at least one year for changes to network elements or operations support systems technology, to afford ALECs sufficient time to make necessary arrangements in light of the proposed change, and ensure that incumbents do not receive an unwarranted "head start" over their competitors.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules, and the Notice of Proposed Rulemaking, FCC 96-182, released April 19, 1996 ("NPRM"), AT&T Corp. ("AT&T") respectfully submits these reply comments on the rules that are necessary to implement the duties imposed by Section 251 of the Communications Act of 1934,[1] as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). This reply is limited to issues involving dialing parity, number administration, access to rights of way, and notice of technical changes.[2]

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[1] A list of parties filing comments in response to the sections of the NPRM concerning dialing parity, number administration, and access to rights of way is included in Appendix A hereto.

[2] On May 30, 1996, AT&T filed reply comments ("AT&T May 30 Reply Comments") in response to sections of the NPRM concerning access to and pricing of unbundled network elements, interconnection, and collocation, as well as resale.

I. THE COMMENTS CONFIRM THE NEED FOR EXPLICIT NATIONAL RULES ON DIALING PARITY AND NUMBER ADMINISTRATION.

There is broad agreement on most of the critical issues relating to implementation of the Act's dialing parity and number administration requirements. In particular, the comments overwhelmingly confirm that the dialing parity requirements of the 1996 Act apply to all telecommunications services -- local and toll, intrastate and interstate,[3] and that "dialing parity" requires that customers are able to dial the same number of digits to complete a call, regardless of the service provider chosen by the caller or called party.[4] The comments also confirm that the Commission should adopt a uniform nationwide plan to implement toll dialing parity through the "Full 2-PIC" presubscription method.[5] There is also broad agreement that "non-discriminatory access" to operator services, directory assistance, and directory listing means that each LEC must afford competing service providers the same access to these functions and resources as the LEC affords itself.[6] Finally, there is nearly unanimous agreement that the Commission's North American Numbering Plan Order (the

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[3] See, e.g., ALTS, p. 4; BellSouth, pp. 9-10; MCI, p. 2.

[4] See, e.g., ALTS, p. 4; Bell Atlantic, pp. 5-6; California, p. 2.

[5] See, e.g., Frontier, p. 2; GSA, p. 2; NYNEX, pp. 3-4; MCI, p. 4. A number of commenters also agree with AT&T that "multi-PIC" or "smart-PIC" methodology may warrant consideration in the future, but is currently unavailable. See, e.g., Ameritech, p. 18; CBT, pp. 3-4.

[6] See, e.g., ALTS, p. 6; California, p. 5; Frontier, p. 4; MCI, p. 8. The assertions of a few incumbent local exchange carriers that "non-discriminatory access" does not mean that local exchange carriers must provide competing carriers the "same" access that the local exchange carrier provides itself are addressed infra at pp. 3-4.

"NANP Order")[7] will satisfy the requirements of Section 251(e)(1) of the 1996 Act, provided that the Commission ensures that all aspects of the NANP Order are expeditiously fulfilled.[8]

A. The Commission Should Adopt A Uniform Nationwide Implementation Plan And Schedule For All Toll Services.

Predictably, a few incumbent local exchange carriers suggest that there is no need for uniform nationwide implementation of toll dialing parity,[9] and propose instead that individual state commissions address implementation matters.[10] These commenters ignore, however, the Commission's prior, successful experience in implementing dialing parity for interLATA toll calls by establishing uniform standards and requirements.[11] These standards provided consistent and predictable access requirements that permitted interexchange carriers efficiently to design their networks and afforded local exchange carriers a prompt and definite determination of their access obligations, while remaining sufficiently flexible to address local conditions where appropriate. In sum, the unqualified success of implementation of dialing

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7 Administration of the North American Numbering Plan, (Phase II), CC Dkt. 92-237, Report and Order, released July 13, 1995 ("NANP Order").

8 See, e.g., BellSouth, p. 19; CTIA, p. 2; California, 7; GTE, p. 20; MCI, p. 10; NYNEX, p. 18; Sprint, p. 13.

9 See, e.g., BellSouth, p. 10; CBT, p. 5; GTE, pp. 9-10; Pacific, pp. 10-13.

10 See, e.g., GTE, pp. 9-10; U S WEST, pp. 4-7.

11 These standards built upon standards established by the court enforcing the Modification of Final Judgment ("MFJ"). See MTS and WATS Market Structure, Phase III, 100 F.C.C.2d 860, 877 (1985); United States v. Western Electric Co., 569 F. Supp. 1057 (D.D.C. 1983).

parity for interLATA toll calls -- both interstate and intrastate -- confirms the benefits of a uniform approach.[12]

Moreover, no commenter suggests any legitimate reason to delay implementation of the dialing parity requirement for intraLATA toll services beyond January 1, 1997, except as provided in Section 271(e)(2)(B). In particular, GSA's suggestion (p. 5) that independent telephone companies should be permitted to delay the provision of dialing parity for intraLATA toll until Bell Operating Companies are required to provide dialing parity in the same local service area is foreclosed by the plain language of the Act. Section 251(b)(3) imposes on all LECs an unqualified duty to provide dialing parity. The limited exception in Section 271(e)(2)(B) applies solely to Bell Operating Companies which are prohibited from providing in-region, interLATA services, not to independent telephone companies (which are subject to no such prohibition). Accordingly, there is no basis to withhold the benefits of dialing parity from customers in territories served by independent telephone companies.

B. The Comments Confirm The Need For Explicit National Rules Applicable To Cost Recovery For Dialing Parity.

A number of commenters agree with AT&T that the Commission should adopt rules ensuring that the costs of dialing parity are recovered in a competitively-neutral manner

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[12] By contrast, a state-by-state approach for intrastate, intraLATA toll calls would be inefficient and potentially confusing because the Commission will in all events be required to implement standards for interstate, intraLATA toll calling

through imposition of an Equal Access Recovery Charge ("EARC") based on minutes of use.[13] Not surprisingly, several ILECs propose that cost recovery issues should be left to "voluntary negotiations."[14] As shown by AT&T and others, however, voluntary negotiations with incumbent monopolists will not produce results that are competitively neutral.

To the contrary, deferring cost recovery issues to negotiations will allow ILECs such as Bell Atlantic (p. 5) and Ameritech (p. 10) to continue to insist that costs of implementing dialing parity be recovered entirely from new entrants. The effect would be to allow incumbent monopolists to extract a fee from new entrants for the privilege of competing with them, and would leave largely in place the barriers to entry that the Act seeks to remove. This underscores the explicit need for national rules that would prohibit such anticompetitive practices.[15] Further, because the introduction of competition through dialing parity and other measures benefits all customers -- including those remaining with incumbents -- it is appropriate to require all carriers to contribute towards cost recovery. There is simply no need

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[13] See, e.g., Frontier, p. 5; MCI, p. 8; Michigan PUC, p. 5.

[14] See, e.g., SBC, pp. 8-9 (proposal to recover costs of dialing parity through "voluntarily-negotiated" agreements between incumbent and other carriers).

[15] Ameritech (p. 10) and Bell Atlantic (p. 5) attempt to justify this anticompetitive result by characterizing new entrants as "cost causers." This characterization ignores that the costs of dialing parity -- which are far outweighed by its benefits -- are a function of the introduction of competition. Further, limiting cost recovery to new entrants would be inconsistent with the Commission's prior decision requiring that the costs of implementing interLATA equal access be recovered from all interexchange carriers, including the incumbent, AT&T.

or legitimate reason to litigate these central cost recovery issues in 51 separate state commissions, as some commenters suggest.[16]

C. Section 251(b)(3) Of The 1996 Act Requires Nondiscriminatory Access To Operator Services, Directory Assistance, Directory Listing.

A few commenters suggest that Section 251(b)(3) of the 1996 Act does not require a LEC to provide competing carriers with the "same" access to these services and capabilities as that carrier provides to itself.[17] These claims are wrong. Section 251(b)(3) requires that customers have the ability to access in the same manner operator services, directory assistance, and directory listing, regardless of the LEC chosen by the customer. Any other access would result in the discrimination that the 1996 Act forbids.

The Commission should likewise reject the attempts of several ILECs to use the provisions of Section 251(b)(3) requiring "non-discriminatory access to operator services, directory assistance and directory listings" to limit their obligations under Section 251(c).[18] Section 251(c)(3) explicitly requires ILECs to provide access to unbundled network elements such as the operator systems that are used to provide directory assistance and other operator functions.[19] Section 251(c)(4) requires ILECs to make available for resale all

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16 See, e.g., GTE, p. 20; Pacific, pp. 16-17.

17 See, e.g., Ameritech, pp. 12-13; Bell Atlantic, p. 6.

18 See, e.g., Ameritech, pp. 12-13 ; Bell Atlantic, p. 6; NYNEX, p. 7.

19 Comments of AT&T, See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, , filed May 16 ("AT&T May 16 Comments"), pp. 33-34.

telecommunications services, including operator services.[20] These explicit requirements are in no way diluted by the additional mandate in Section 251(b)(3) that LECs provide nondiscriminatory access to operator services and directory assistance.

D. The Commission Should Give Additional Guidance Concerning The Requirements Of The Ameritech Order.

Commenters agree that the Ameritech Order strikes a proper jurisdictional balance, permitting state commissions to make initial determinations regarding area code administration, subject to Commission review.[21] AT&T concurs with the suggestion of some commenters that the Commission provide additional guidance concerning the Ameritech Order.[22] Specifically, these commenters ask the Commission to identify certain minimum criteria that must be satisfied before an "overlay" area code relief plan can be considered by a state commission. AT&T believes that the minimum criteria must include (i) mandatory ten-digit dialing within all

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[20] See AT&T May 16 Comments, pp. 76-78. In this regard, the Commission should also reject the claims of NYNEX (p. 7) and other ILECs that they may refuse to comply with reasonable requests to brand resold operator services as those of the reseller. As AT&T has shown (AT&T May 16 Comments, p. 81 n.123), continued use of the ILEC's own brand with services that are resold to ALEC customers would stifle competition and confuse customers. The Illinois Commerce Commission recently found such branding to be technically feasible. See AT&T Communications of Illinois, Inc. and LDDS Communications, Inc. d/b/a LDDS Metromedia Communications, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company d/b/a Ameritech Illinois and Central Telephone Company Pursuant to Section 13.505.5 of the Illinois Public Utilities Act, Illinois Commerce Commission, Dkts. 95-0458 and 95-0531 (consol.), Hearing Examiner's Proposed Order, May 16, 1996, pp. 52-54 .

[21] See, e.g., Bell Atlantic, p. 10; BellSouth, pp. 19-20; California, p. 8; Sprint, p. 15; U S WEST, p. 2.

[22] See MCI, pp. 9-12; MFS, p. 4.

affected NPAs, (ii) permanent number portability, (iii) equitable allocation of all NXXs within the affected NPAs, and (iv) application of the "overlay" to all telecommunications carriers and services.[23] The Commission's identification of these criteria would provide additional guidance to state commissions administering area codes, and minimize the potential for misinterpretation of the Ameritech Order.[24]

II. THE COMMISSION MUST ENSURE THAT TELECOMMUNICATIONS CARRIERS HAVE NONDISCRIMINATORY ACCESS TO ALL UTILITY PATHWAYS.

The comments submitted by those entities that own or control the pathways necessary to reach telecommunications customers generally reveal a profound reluctance to accept the statutorily mandated obligation to provide ALECs with the nondiscriminatory access to these pathways that is required by the Act. The comments thus underscore the need for national rules that make explicit the nature and scope of the utilities' new responsibilities under new Section 251 and amended Section 224 of the Act. Such rules are essential to the creation of facilities-based local competition.[25]

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[23] See id.

[24] As the NPRM (¶ 257) recognizes, the Texas PUC recently misapplied the Ameritech Order in directing Southwestern Bell to request area code assignments from the North American Numbering Plan Administrator to implement an "overlay" for wireless carriers only.

[25] Ameritech erroneously argues that the Commission is not authorized even to issue rules governing the rates, terms, and conditions of access. Ameritech, pp. 33-34. Contrary to Ameritech's reading of the statute, however, Section 224(c) is not a plenary grant of authority to the states concerning those issues. A State can displace the Commission's regulations only after the State has "issued and made effective" its regulations and certified to the Commission

(footnote continued on following page)

The commenters generally endorse the Commission's tentative conclusions that incumbent utilities must grant access to poles, ducts, conduits, and rights-of-way on the same terms and conditions as they grant such access to themselves. See NPRM, ¶ 222. Indeed, a number of commenters recognize that such access must extend broadly to all "rights-of-way," including entrance facilities, telephone closets, equipment rooms, cable vaults, and any other such pathway.[26] As AT&T demonstrated, any more constricted reading of the statute would frustrate Congress' intent to establish the conditions necessary for the development of facilities-based competition.[27]

Nonetheless, some incumbent utilities seek to eviscerate the Act's clear commands by denying their obligations to provide truly "nondiscriminatory" access. None of their claims has any substance.

A. The Commission Should Clarify That The Duty To Provide Nondiscriminatory Access Precludes Utilities From Favoring Themselves Over Competitors.

Some of the owners take issue with the very principle of nondiscriminatory access. They argue that their obligation to provide nondiscriminatory access is fulfilled so

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that its regulations conform to certain requirements, and the Commission has accepted that certification. 47 U.S.C. § 224(c)(2), (3); 47 C.F.R. § 1.1404. Thus, the default regime is federal, to be administered by the Commission, and this, in conjunction with the Commission's responsibilities under Sections 251(b)(4), 251(d), and 271, gives the Commission not only the authority but the obligation to promulgate needed regulations.

[26] See, e.g., MFS, p. 9; ALTS, p. 7; ACSI, p. 7.

[27] See generally AT&T, pp. 12-15.

long as they treat all competing LECs equally.[28] This argument ignores that the principal purpose of the Act is to provide the means for new entrants to compete with incumbents that control critical inputs to production such as the pathways occupied by their facilities. If the owners of these facilities are able to favor themselves and their affiliates at the expense of competitors, they can effectively slow or stop competition, thereby undermining the very purpose of the Act.

The one exception that the statute permits to this requirement is for pathways not used for "any wire communications." But this exception is a narrow one. The plain language of the statute expressly forecloses the argument of some electric utilities that their pathways are exempt if only "internal communications facilities" are attached.[29] Congress amended Section 224, using the broadest possible language, to encompass pathways used for "any wire communications" (new language underscored). On its face, the statute does not permit a distinction between wire communications for "internal" use only and other wire communications. Moreover, given the acknowledged desire of at least some electric utilities to compete with ALECs as telecommunications providers,[30] it is entirely proper to treat electric

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[28] E.g., Ameritech, p. 34; see also Pacific, pp. 20-21. Ameritech's statutory argument misses the mark. Its interpretation of "nondiscriminatory access" would render the statute's duty to provide access meaningless. Under Ameritech's theory, a utility complies with the statute as long as it treats all ALECs equally; thus, a utility could literally comply with the statute by denying access to all ALECs. Congress clearly intended Section 224 to promote facilities-based competition, and that can occur only if Section 224(f) is read to place ALECs on an equal footing with the incumbent.

[29] UTC/EEI, p. 7.

[30] See, e.g., Delmarva, p. 8 (Delmarva is "presently considering providing telecommunications services to the public").

utilities' pathways with attachments used for internal communications the same as pathways with attachments used for other communications. To do otherwise would allow an electric utility, in the guise of expanding its internal network, to put in place a competitive network prior to entering the market, all the while denying the requests of ALECs for the attachments they would need to compete.

B. The Commission Should Confirm That Utilities Have An Affirmative Obligation To Provide Access To Their Pathways.

In its opening comments, AT&T set forth three elements of the duty of nondiscriminatory access that must be honored if Section 224(f) is to achieve its purpose. AT&T, pp. 16-18. None of the rationales offered by various ILECs and electric utilities to avoid these obligations has merit.

1. Insufficient Capacity.

The Commission should reject the arguments offered by LECs that are based, whether explicitly or implicitly, on the assumption that LECs can deny carriers access to pathways on the grounds of insufficient capacity. The statute simply does not offer LECs that alternative. Instead, the statute allows only electric utilities the right to deny access based on insufficient capacity. See 47 U.S.C. § 224(f)(2).

Many of the LECs' positions cannot be reconciled with this limitation. For example, while SBC asserts (p. 18) that "[t]he Commission should not require carriers to build additional transmission facility capacity merely because their new competitors would like to place their facilities in the same rights-of-way," that is precisely what the statute requires

ILECs to do if necessary to accommodate competitors' access requests.[31] Ameritech's argument (Comments, p. 37) that "the LEC constructing the pole, duct or conduit [should] have first right to use its own facilities to meet its projected customer demand" is similarly beside the point. Because each LEC has an obligation to accommodate all who seek space, it must add whatever capacity is needed to meet demand; a right to first use simply has no meaning given the LECs' statutory obligations.

In the same vein, many LECs point to their existing business practice of maintaining "reserve capacity" to cover anticipated demand over a period of some three to five years.[32] The existence of such reserve capacity provides no basis for denying access, for several reasons. First, the statute precludes any access denial for reasons of "insufficient capacity," whether current capacity is actually being used or merely being held in reserve. Second, as a policy matter, to permit LECs to hoard the capacity needed to serve customers over the next three to five years would simply lock in their incumbency over that period, thereby defeating any realistic hope of facilities-based competition. Third, and most fundamentally, the LECs' argument is premised on a mistakenly static view of capacity. As a large electric utility trade group admits, although reserve capacity may not be "required

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[31] Similarly, although GTE broadly observes (Comments, p. 26) that "nothing in the 1996 Act creates any obligation on LECs or electric utilities to subsidize new entrants by perpetually building new facilities for them to place their equipment," the Act does require LECs to expand capacity where necessary to accommodate new entrants and provides for LECs to be compensated for doing so.

[32] E.g., Bell Atlantic, p. 13 (2-3 years); Pacific, p. 20; SBC, pp. 18-19 (5 years); U S WEST, p. 18 (3-5 years).

immediately by the facility owner, it will be used eventually."[33] As it is used, however, new capacity will have to be created, if for no other reason than to create the "essential" spare capacity needed to accommodate the next three to five years of growth. See, e.g., U S WEST, p. 18 ("When a certain threshold capacity level is reached (e.g., normally 85% of usable capacity for U S WEST conduit), planning for additional construction jobs is initiated").

Given these facts, the Commission should clarify that LEC needs for reserve capacity will not provide a basis for any refusal to provide access. Specifically, the Commission should declare that any capacity ostensibly reserved for demand in excess of one year in the future is "spare capacity" that is to be made available immediately to competing LECs upon request. If the LEC lacks sufficient spare capacity to meet a request for attachment, then it must undertake expansion of its facilities to accommodate the request.

The Commission should also recognize that many of the other purported concerns about requiring LECs to make capacity available are unfounded. With regard to telephone poles, for example, some LECs (and electric utilities) assert a litany of purported difficulties or obstacles to adjusting existing attachments to make more efficient use of existing space, or replacing one pole with another that is five or ten feet taller.[34] The reality, as

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[33] UTC/EEI, p. 9.

[34] See, e.g., AEPS, p. 23 (¶ 26); Delmarva, pp. 6-7.

several utilities admit, is different: "In most situations, poles can be quickly replaced with taller poles with relative ease and modest cost."[35]

Similarly, with regard to conduits, the concerns of many commenters about the limits of capacity are unfounded. The use of inner duct, together with the replacement of obsolete or low-capacity media, should be sufficient to provide more than enough capacity even within the existing conduit.[36]

Unlike LECs, electric utilities may deny access on grounds of insufficient capacity. To deny access on that ground, however, the electric utility should bear the burden of showing that existing capacity truly is insufficient and therefore could not be made sufficient through reasonable accommodation. The standard for determining whether capacity is insufficient should be no different than the standard the utility applies to itself. If, for example, pursuant to the utility's existing practices, the need to increase pole size would be a capacity constraint that would preclude further expansion of capacity, then the utility may refuse to grant access to ALECs on grounds of insufficient capacity. If, on the other hand, the utility routinely installs taller poles to accommodate its own growth, the need to install a replacement pole to accommodate an ALEC's attachment request should not enable the utility

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[35] Delmarva, p. 15; see also PNM, p. 20 (same); KCPL, p. 2 ("If there is insufficient space on utility poles for an attachment, i.e., not enough room for above ground clearance and space between the various lines, the attaching entity has the option to pay for taller poles and the cost of transferring existing attachments . . . to the new poles."); OhEdison, p. 16 ("In the context of distribution poles, the threat to future utility needs may be minimal, because distribution poles must be at some minimal height (about 35 feet) for safety purposes, which in most cases will be sufficient to support several attachments").

[36] See, e.g., Continental, pp. 16-17; MFS, p. 10.

to deny the attachment on grounds of insufficient capacity. The same equal treatment principle should apply to requests for conduit. In any challenge to a denial of access on capacity grounds, the utility should bear the burden of proving that it faces a true capacity constraint -- i.e., one that, pursuant to its own established practices, would have constrained it from accommodating its own need for expansion.

2. Safety, Reliability, And Generally Applicable Engineering Purposes.

The statute also permits electric utilities to deny access on grounds of safety, reliability and generally applicable engineering purposes. Here, too, the burden of proof should be placed on the utility denying access. Because the basic purpose of the statute is to place a new obligation upon the electric utilities -- not to relieve them of one -- it is clear that the burden of escaping that obligation should fall upon the electric utilities. None of the electric utilities that propose shifting the burden to the requesting carriers offer any supporting statutory analysis.

Several of the electric utilities, however, confirm that imposing such a burden upon them would be reasonable and fair. Delmarva Power states that "the utility may appropriately bear the burden of proof to establish that proposed attachments quantifiably threaten reliability." Delmarva, p. 19. Indeed, Delmarva goes on to explain that it "has no intention of using reliability as an excuse to deny access and it is confident that its power engineers can credibly demonstrate which proposed attachments threaten reliability." Id. Other power companies take a comparable position.[37]

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[37] See OhEdison, pp. 24-25; PNM, p. 23.

Particularly with regard to reliability, the comments underscore the need for rejecting the giving of "significant discretion" to the utilities and instead imposing upon them the burden of proof.[38] As several commenters admit, reliability is not a fixed concept but a highly subjective concern that varies from company to company and is changing over time in response to competitive pressure.[39] To avoid creating a loophole that would allow power companies to deny access improperly, the Commission should clarify that an electric utility seeking to refuse access on reliability grounds bears the burden of showing that the attachment will demonstrably compromise the utility's ability to attain a reliability goal that was formally established by the utility in advance of the request for access.

Unlike standards for reliability, standards for safety are quantifiable and objectively established and, therefore, will provide a basis against which to measure a utility's asserted refusal to provide access. The Commission should clarify, however, that only a violation of an objectively established safety standard (whether established by the company or by a neutral source) will provide a cognizable ground for denying access. Formulations urged by some commenters, which would permit a utility to deny access whenever an attachment

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38 See, e.g., AEPS, p. 26.

39 See, e.g., AEPS, p. 36 (¶ 49) (standards vary "even within that same utility's service area"); id., p. 38 (¶ 53) ("the reliability of a system is company specific [and is] designed and dependent upon the number and length of outages customers are willing or able to accept, under the circumstances"); PNM, p. 22 (competitive pressures are changing the standard of reliability).

created a "possible risk of violating" a company's "internal" assessment of what is safe, are too broad.[40]

3. Easements.

The Commission should also clarify the obligations imposed by the Act with respect to easements. First, it should make plain, contrary to the comments of BellSouth (p. 17), that the term "right-of-way" does in fact extend to private as well as to public easements. BellSouth offers no basis in the statutory language or purpose for its proposed interpretation which, if adopted, would seriously undermine the effectiveness of amended Section 224. An easement granted by a private property owner, no less than one granted by a public owner, grants the holder a "right of way" as that term has long been understood. Having obtained such vital rights-of-way by virtue of decades of protected status as monopoly providers of local telecommunications service, the LECs must be required to provide access to their private as well as public easements.

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[40] See AEPS, p. 27. Notably, the statute does not extend to the ILECs the option of denying access on grounds of safety, reliability, or generally applicable engineering concerns, and for good reason. Unlike electric utilities, who have explained how their provision of electric power may give rise to certain legitimate safety or engineering concerns, none of the ILEC commenters have provided any significant basis for concluding that safety or engineering concerns might genuinely apply only to an ALEC's proposed attachment, or the capacity expansion needed to accommodate it, but not to the ILEC's own use and periodic expansion of capacity. This is not to say that the exceptional case may not arise where an ILEC may invoke a legitimate safety or engineering reason that precludes further expansion, but the Commission should make clear that any such invocation shall be viewed as highly exceptional and place the burden of demonstrating the existence of such a constraint upon the ILEC.

Contrary to the views expressed in some comments, the terms of private easements should not create genuine obstacles to access. It will be the rare easement that will not allow a LEC, for example, to expand the capacity of its wire system within the parameters covered by the easement.[41] There is, in turn, no reason to expect serious opposition from the property owner if the purpose of expansion is to accommodate the LECs' statutorily mandated obligation to provide access to its pathways. Because the utility is in the best position to know what private easements may be affected by a request for access, the Commission should clarify that the requesting carrier has no obligation to determine in the first instance whether the property owner will interpose any objection to the use of any pathway.

The Commission should further clarify that, in the event a private owner objects to another party's use of its easement, the LEC is obligated to make available any spare capacity that it has to accommodate the carrier's request. For example, the Commission should clarify that, in the event an ALEC were barred from installing additional conduit in

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[41] For example, neither of the two examples offered by the Rural Telephone Association provides any basis for concern. The first easement, issued by the United States Department of the Interior, grants the holder the "right to construct . . . a buried fiber optic and copper telephone cable system" under a strip of public land that is "20 feet wide," and contemplates that its provisions will be "binding" not only on the "holder" but also upon its "assigns." RTC, Attachment 2 (emphasis added). Given that typical conduit is several inches in diameter, there is no doubt that this easement grants the holder ample authority and ability to accommodate any request to use the easement.

The second easement, from Burlington Railroad (Attachment 3), permits the holder to place and subsequently repair, remove, or reconstruct "fiber optic telecommunications cable inside a 2.44" steel casing pipe." Efficient use of such a pipe (e.g., by subdividing it with inner duct and using high capacity fiber cable), should make it unnecessary for the holder even to need to approach the railroad for permission for a second cable.